UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

TEMPLE UNIVERSITY HOSPITAL, INC.	:	
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Employer	:	
	:	
and	:	**Case No. 04-RC-162716**
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TEMPLE ALLIED PROFESSIONALS, PENNSYLVANIA ASSOCIATION OF STAFF NURSES AND ALLIED PROFESSIONALS (PASNAP)	:	
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Petitioner	:	

PETITIONER'S BRIEF ON REVIEW

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Petitioner Temple Allied Professionals, Pennsylvania Association of Staff Nurses and Allied Professionals ("PASNAP" or "Union") submits this Brief on Review in response to the Board's December 29, 2016 Order Granting Review in Part and Invitation to File Briefs.

I. INTRODUCTION

The Union has represented a unit of professional and technical employees employed by Temple University Hospital ("TUH" or "Employer") since 2006, when the Pennsylvania Labor Relations Board ("PLRB"), a state labor agency, certified the Union as the employees' representative following an election conducted by the PLRB. The parties subsequently entered into a series of collective bargaining agreements for the unit, the most recent of which expired on September 30, 2016. Prior to the present case, the PLRB always exercised authority over the bargaining unit. The present case arose when the Union filed a petition with the Board, rather

than the PLRB, seeking an election among certain unrepresented job classifications at TUH to determine whether they wished to join the existing unit.

Following three days of hearings (on December 16-17, 2015 and January 5, 2016), the Acting Regional Director ("ARD") issued a Decision and Direction of Election ("DDE") on January 22, 2016. In the election that followed, which took place on January 28, 2016, the employees voted to join the existing unit, and the ARD certified the Union as the employees' representative on February 22, 2016. On March 10, 2016, TUH filed its Request for Review.

In its December 29, 2016 response thereto, the Board rejected TUH's arguments that the Board lacked jurisdiction over the petition and that the Union was judicially estopped from filing the petition. However, the Board did grant review to consider whether it should exercise its discretion to decline jurisdiction over TUH and whether it should extend comity to the professional and technical unit certified by the PLRB.

As to the first issue, there is no reason to believe that the Board's exercising jurisdiction over TUH will fail to advance the goals of the Act—the applicable standard when determining whether to decline jurisdiction in a specific case. TUH is not distinguishable from any other large, non-profit hospital over which the Board routinely exercises jurisdiction. Although it is true that the PLRB has exercised authority over TUH in the past and that TUH has ties to Temple University ("University"), an exempt entity, these are not compelling reasons to decline jurisdiction.

As to the second issue, the Board should extend comity to the professional and technical unit certified by the PLRB. That unit meets the standard established by the Board in determining whether to extend comity to a state certification. Even if it were true that the PLRB's certification issued at a time when the Board, and not the PLRB, had jurisdiction over TUH,

Board precedent still supports extending comity because TUH stipulated and, in fact, actively argued that the PLRB had jurisdiction rather than the Board during the 2006 PLRB representation proceedings. The Board has held that, regardless of whether the state agency had jurisdiction, the Board will recognize a certification issued by that agency if the employer agreed that the state agency could determine the representational preferences of its employees.

The Board should extend comity for the additional reason that TUH immediately acknowledged the legitimacy of the PLRB certification and began bargaining, eventually negotiating multiple successive collective bargaining agreements for the professional and technical unit. The Board has held that an employer who recognizes a state agency's certification and commences bargaining cannot then challenge the certification as void for lack of jurisdiction. For either or both of these reasons, comity is appropriate here.

II. STATEMENT OF ISSUES

1. SHOULD THE BOARD EXERCISE ITS DISCRETION TO DECLINE JURISDICTION OVER TUH?

2. SHOULD THE BOARD EXTEND COMITY TO THE UNIT OF TUH'S PROFESSIONAL AND TECHNICAL EMPLOYEES CERTIFIED BY THE PLRB IN 2006?

III. FACTS

Until 1995, the acute care hospital at which the employees at issue in this case work was operated by the University as one aspect of its activities (DDE at 3). In 1972, the Board, while acknowledging that it possessed statutory jurisdiction over the University, exercised its discretion to decline to exercise that jurisdiction. *Temple University*, 194 NLRB 1160 (1972). The University's labor relations were consequently governed by Pennsylvania law rather than the Act——specifically, by the Pennsylvania Public Employe Relations Act ("Act 195"), the Act of

July 23, 1970, P.L. 563, No. 195; 43 P.S. § 1101.101, *et seq.* Then, in 1995, TUH was incorporated in Pennsylvania as a nonprofit corporation and assumed control of the acute care hospital formerly operated by the University (DDE at 3).

Prior to 2005, a different union ("incumbent") represented professional and technical employees at TUH. In 2005, PASNAP sought to supplant the incumbent as the representative of these employees by filing a petition for an election with the PLRB. (Bd. Exh. 7(k).)[1] In response to this petition, the Employer stipulated that it was subject to the PLRB's jurisdiction. (Bd. Exh. 7 at ¶ 30.) In the ensuing proceeding, the incumbent argued that the Board, rather than the PLRB, had jurisdiction over TUH. TUH and the Union argued the opposite—i.e., that the PLRB, and not the Board, had jurisdiction over TUH. The PLRB sided with TUH and the Union and concluded it had jurisdiction over TUH. (DDE at 6.)

The PLRB ultimately conducted an election in 2006 among "all full-time and regular part-time professional and technical employes; and excluding physicians, nurses, pharmacists, office clerical employes, students, and employes on temporary visas, management level employes, supervisors, first level supervisors, confidential employes and guards as defined in the Act [meaning Act 195]."[2] In the election, the professional employees were afforded an opportunity to vote on whether they wished to be included in a unit with technical employees and voted for inclusion. Employees in the unit voted to be represented by the Union. The PLRB certified the Union as the exclusive bargaining representative of the unit in 2006, based on the election result. (Bd. Exh. 7(k); DDE at 6-7.)

[1] This is a citation to Board Exhibit 7(k), which is the PLRB's 2006 certification of the professional and technical unit, issued in *Temple University Health System*, Case. No. PERA-R-05-498-E (2006).

[2] Act 195 refers to employees subject to Act 195 as "employes." 43 P.S. § 1101.301(2).

No party filed objections to the 2006 PLRB election. Once the PLRB certified the Union, TUH immediately recognized the Union as the professional and technical employees' representative and began bargaining. The parties have negotiated multiple successive collective bargaining agreements, the most recent of which ran from October 1, 2013 through September 30, 2016. (DDE at 7.)

The parties stipulated that TUH and the University are not a single employer (DDE at 3). The University "do[es] not negotiate the collective-bargaining agreements covering [TUH] employees…cannot bind [TUH] to grievance settlements or collective-bargaining agreements," and "plays no role in the day-to-day functioning of labor relations at [TUH]" (DDE at 6). However, the University does have the authority to appoint and remove the members of the governing board of Temple University Health Systems ("TUHS"), a nonprofit corporation, under TUHS's corporate bylaws; and TUHS, in turn, has the authority to appoint and remove members of the Employer's governing board under *the Employer's* corporate bylaws (DDE at 3-4). Thus, the University is still tied to TUH through these layers of bylaws.

From TUH's incorporation in 1995 until the present proceeding, the PLRB exercised authority over TUH (DDE at 6). Then, on October 27, 2015, the Union filed a petition with the Board seeking a self-determination election among TUH's medical interpreters and transplant financial coordinators to determine whether they wished to join the professional and technical unit, giving rise to the present case.[3]

[3] Such elections are also called *Armour-Globe* elections, after the early Board cases establishing their validity and structure. *Armour & Co.*, 40 NLRB 1333 (1942); *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937).

IV. ARGUMENT

A. THE BOARD SHOULD NOT EXERCISE ITS DISCRETION TO DECLINE JURISDICTION OVER TUH

Even when the Board has the authority under the Act to exercise jurisdiction over an employer, the "Board has some discretion" to determine whether it would effectuate national labor policy to do so. *See Columbia University*, 364 NLRB No. 90, slip op. at 7 (2016) (considering whether to exercise discretion to decline jurisdiction over student assistants); *see also State Bank of India*, 229 NLRB 838, 841-843 (1977) (holding that Board would no longer decline jurisdiction over agencies or instrumentalities of foreign states). "However, in exercising this discretion, [the Board] tread[s] carefully and with an eye toward the Act's purposes." *Columbia, supra*, slip op. at 7 fn. 56. Where the Board "ha[s] no reason to believe that extending bargaining rights will not meaningfully advance the goals of the Act," it asserts jurisdiction. *Ibid.*

Since Public Law 93-360, which took effect on August 24, 1974, "amended the National Labor Relations Act to eliminate the exemption from the coverage of the Act previously accorded to private, nonprofit hospitals" the Board has exercised jurisdiction over such hospitals. *See, e.g., St. Francis Hospital*, 219 NLRB 963, 964 (1975). Indeed, to the Union's knowledge, since Congress specifically amended the Act to bring private, nonprofit hospitals under the Board's jurisdiction, the Board has exercised that jurisdiction over every private, nonprofit hospital that has come before it. TUH is a private, nonprofit hospital subject to the Board's jurisdiction. Therefore, to decline jurisdiction over TUH on a discretionary basis, the Board would have to conclude that it effectuates national labor policy to assert jurisdiction over every private, nonprofit hospital except one: TUH. The Employer possesses no qualities to justify such an extraordinary distinction.

Both before the ARD and in its Request for Review, the Employer has advanced three reasons why it should become the only private nonprofit hospital ever over which the Board declines jurisdiction: "1) the relationship between TU, TUHS [which stands for Temple University Health Systems], and TUH make jurisdiction inappropriate over TUH under the principles discussed in Temple University; 2) declining jurisdiction does not deprive employees of the rights provided by Congress under the NLRA; and 3) Board jurisdiction does not effectuate the purposes of the Act in light of the intervening 40+ years since the 1972 decision, including developments in state and federal law and the bargaining history between TU, TUHS, and TUH and their unions." (RFR at 19; Emp. PHB at 29 [listing exact same three reasons].)[4] The Board has addressed circumstances indistinguishable from those identified by TUH before and found them insufficient to justify discretionarily declining jurisdiction.

1. UNDER NOW WELL-ESTABLISHED BOARD PRECEDENT, TUH'S TIES TO THE UNIVERSITY ARE NOT GROUNDS TO DECLINE JURISDICTION

The Employer argued that the Board should exercise its discretion to decline jurisdiction over TUH because "[the University] and TUH are so intertwined that the two cannot be separated for purposes of the appropriateness of the Board's jurisdiction. [The University] not only has the ability, but does control TUH in key ways that make it inappropriate for their labor relations to operate under separate and distinct legal schemes." (RFR at 19; Emp. PHB at 29 [same assertion using near-identical language]). The Employer's argument is squarely defeated by the Board's now well-established holding in *Management Training Corp.*, 317 NLRB 1355 (1995) as well as its recent decisions asserting jurisdiction over charter schools in *The*

[4] Citations to the Employer's Request for Review will appear as "RFR at" followed by the relevant page number. Citation's to the Employer's Post-Hearing Brief to ARD will appear as "Emp. PHB at" followed by the relevant page number.

Pennsylvania Virtual Charter School, 364 NLRB No. 87 (2016) and *Hyde Leadership Charter School—Brooklyn*, 364 NLRB No. 88 (2016).

In *Management Training*, the Board held that it would no longer exercise its discretion to decline jurisdiction over an employer based on the fact that an exempt governmental entity controlled terms and conditions of employment of the employer's employees. *Id.* at 1357, 1358. Instead, in choosing whether to assert jurisdiction over an employer with close ties to the exempt governmental entity, the Board would "only consider whether the employer meets the definition of 'employer' under Section 2(2) of the Act, and whether such employer meets the applicable monetary jurisdictional standards." *Id.* at 1358 (footnote omitted). Thus, even though the employer in *Management Training*'s entire business consisted of operating job corps centers on behalf of the United States Department of Labor ("DOL"), and even though DOL exercised substantial control over staffing, organization, wages, leave, holidays, and other economic terms for the employees in question, the Board still concluded it would effectuate the policies of the Act to assert jurisdiction over the employer. *Id.* at 1355; *see also D & T Limousine Service, Inc.*, 320 NLRB 859, 860 fn. 3 (1996) (applying *Management Training* to employer whose business consisted of providing services to exempt railroads via contracts that granted the railroads extensive control over employees' terms and conditions).

"All the United States Courts of Appeals that have considered the issue have affirmed the Board's test in *Management Training*." *Recana Solutions*, 349 NLRB 1163, 1165 fn. 8 (2007) (citing *Teledyne Economic Development v. NLRB*, 108 F.3d 56 (4th Cir. 1997); *Pikeville United Methodist Hospital of Kentucky v. NLRB*, 109 F.3d 1146 (6th Cir. 1997); and *Aramark Corp. v. NLRB*, 179 F.3d 872 (10th Cir. 1999)). Moreover, the Board has formally rejected requests to reconsider *Management Training*'s holding on multiple occasions. *Jacksonville Urban League*,

Inc., 340 NLRB 1303, 1303 (2003); *Recana*, *supra* at 1165 fn. 8. Thus, the Board, with the approval of the Courts of Appeals, has held that an exempt entity's control over an employer does not constitute grounds for declining jurisdiction over that employer. *Management Training*, *supra* at 1358.

Despite this precedent, TUH asks the Board to decline jurisdiction because the University "not only has the ability, but does control TUH in key ways that make it inappropriate for their labor relations to operate under separate and distinct legal schemes." (RFR at 19; Emp. PHB at 29 [same assertion using near-identical language]). However, as the Board has repeatedly held, the fact that an exempt entity (such as the University) exercises control over an employer subject to the Act (such as TUH) is not grounds for the Board to decline jurisdiction over the employer. *E.g., Management Training*, *supra* at 1358. Indeed, in *Management Training* and *D & T Limousine*, the exempt entities exercised substantially more control over employees' terms and conditions than the University does over TUH. Thus, in those cases, the exempt entity was expressly empowered by contract to sign off on key economic terms and conditions for the employer's employees. Here, by contrast, the University does not negotiate collective bargaining agreements for TUH employees, cannot bind TUH to grievance settlements or collective bargaining agreements, and plays no role whatsoever in day-to-day labor relations at TUH (DDE at 6); rather, the University's ties to TUH are indirect and the result of corporate documents (DDE at 3-4). Thus, if the control exercised by the exempt entities in *Management Training* and *D & T* was not of concern to the Board, the more limited control exercised by the University is of no concern either.

That TUH's ties to the University do not constitute grounds for declining jurisdiction is confirmed by two recent decisions of the Board asserting jurisdiction over charter schools. *See*

Pennsylvania Virtual, *supra*, slip op. at 10; *Hyde Leadership*, *supra*, slip op. at 8-9. In each of these cases, the Board asserted jurisdiction over the charter school at issue even though state statute regulated the school's operations in detail, the state government imposed exacting, continuous scrutiny on the school's activities, the state could revoke the school's right to operate at any time, the state could choose not to renew the school's charter every few years, and all or virtually all of the school's funding came from public entities. *Pennsylvania Virtual*, *supra*, slip op. at 1-3; *Hyde Leadership*, *supra*, slip op. at 1-3. Citing the progeny of *Management Training*, the Board concluded that the "exacting oversight" exercised by the government over the schools was not reason for the Board to exercise its discretion to decline jurisdiction. *Pennsylvania Virtual*, *supra*, slip op. at 10, 10 fn. 31; *Hyde Leadership*, *supra*, slip op. at 8-9, 8 fn. 23.

Here again, the charter schools' entanglement with public entities was far more extreme than TUH's ties to the University. Moreover, the public entities' control over the charter schools had a large, direct impact on employees' terms and conditions of employment—the state specified the employees' retirement plan, health care benefits, performance metrics, and other vital terms and conditions of employment. *Pennsylvania Virtual*, *supra*, slip op. at 1-3; *Hyde Leadership*, *supra*, slip op. at 1-3. The University, on the other hand, sets none of the terms and conditions of TUH employees (DDE at 6). Thus, if the involvement of the charter schools at issue in *Hyde Leadership* and *Pennsylvania Virtual* with exempt governmental entities did not justify declining jurisdiction, TUH's involvement with the University surely does not either.

2. THE EMPLOYER'S ASSERTION THAT NO EMPLOYEE RIGHTS WOULD BE DEPRIVED IF JURISDICTION IS DECLINED IS BOTH UNTRUE AND IRRELEVANT

TUH also proffers the blatantly inaccurate assertion that "no employees [sic] rights will be deprived if the Board declines jurisdiction" as a reason why the Board should decline

jurisdiction in this matter. (RFR at 25-26.) Contrary to TUH's claim, however, entire categories of employee will be completely deprived of the right to organize if the Board declines jurisdiction in this matter—specifically, medical interns, residents, and clinical-fellows (collectively referred to as "housestaff"). The parties stipulated that the individuals filling these positions at the hospital in the present case are employed by TUH, not the University. (Bd. Exh. 7 at ¶ 18.) Housestaff are employees covered by the Act and entitled to its protections. *Boston Medical Center Corp.*, 330 NLRB 152 (1999). However, as TUH is well aware, they are not employees under Pennsylvania law. *Philadelphia Association of Interns & Residents v. Albert Einstein Medical Center*, 470 Pa. 562, 568 (1976) ("We must now turn to the question of whether the interns, residents and clinical-fellows at Temple University Hospital are public employees within the meaning of Act 195…we…find that because of their unique position and status, appellants are not employees within the meaning of Act 195.").

Thus, if the Board declines to assert jurisdiction, housestaff employed by TUH will be completely deprived of the right to organize guaranteed them by the Act. The Board hesitates to decline jurisdiction where doing so will completely deprive employees of the right to organize. *See Howard University*, 224 NLRB 385, 386 fn. 9 (1976) (noting that employees of a university in the District of Columbia "do not come under a Federal or District of Columbia public employees relations arrangement, statutory or otherwise" and "would be in a no-man's land without an avenue of redress" "[i]f the Board withheld its jurisdiction"); *Pennsylvania Virtual*, *supra*, slip op. at 11 ("Declining jurisdiction would deprive [the employer] and its employees of the benefit of being covered by the Act."). Contrary to the Employer's claim, employees will

lose their right to organize if the Board declines jurisdiction, and this loss weighs against the Board doing so.[5]

In any event, the Board does not decline to assert jurisdiction even when the affected employees would be covered by state law protecting the right to organize in some fashion. *See, e.g.*, *Hyde Leadership*, *supra*, slip op. at 1-2 (asserting jurisdiction even where the union argued jurisdiction should be declined and the employees subjected to state law and even where state statute expressly covered the employees in question). Were the Board to start declining jurisdiction for this reason, it would not only dramatically reduce the Board's jurisdiction, lead to protracted litigation over the applicability and comparability to the Act of collective bargaining statutes in each of the various states, and shatter the Act's central policy objective of establishing a uniform regulatory framework for private sector labor relations throughout the United States; it would also violate the Act's text, which specifies the circumstances in which the Board may cede jurisdiction over covered employees to a state. 29 U.S.C. § 160(a).

In particular, the Board may only cede jurisdiction to a state by "enter[ing] into cession agreements," and "the Board has consistently declined to enter into cession agreements where the statutes are not substantially identical." *Produce Magic, Inc.*, 318 NLRB 1171, 1171-72 (1995). TUH's proposed policy—that the Board would use its discretion to decline jurisdiction to effectively cede jurisdiction to a state agency any time state law would cover the employees in

[5] In addition, if the Board declines jurisdiction, TUH employees will lose specific rights guaranteed by the Act but not by Act 195. For instance, under Act 195, a struck employer may seek a total injunction against the strike where "such a strike creates a clear and present danger or threat to the health, safety or welfare of the public." 43 P.S. § 1101.1003. Because of this restriction, the right to strike under Act 195 is significantly more circumscribed than the right to strike under the Act. Thus, if the Board declines jurisdiction, TUH employees will lose the full right to strike that they would have under the Act. This further disproves TUH's claim that no employee rights will be lost if the Board declines jurisdiction.

question—is contrary to the clear congressional mandate that such a cession be done by agreement and subject to specified conditions. As has always been true, the existence of a state law that would catch employees over whom the Board declined jurisdiction is not grounds for declining jurisdiction. *See, e.g.*, *Hyde Leadership*, *supra*, slip op. at 1-2.

3. THE PARTIES' BARGAINING HISTORY IS NOT GROUNDS FOR DECLINING JURISDICTION

TUH also argues that, because the PLRB has exercised jurisdiction over its employees in the past, the Board should decline jurisdiction over TUH now. (RFR at 22-25.) More specifically, TUH's position is that it has achieved stable collective bargaining relationships with representatives of several units of employees pursuant to Act 195 and that transitioning to coverage under the Act now would be disruptive for those relationships.

Contrary to the Employer's argument, the Board has exercised jurisdiction over employers even where doing so means that a well-established collective bargaining relationship governed for a period of time by state law instead will now be controlled by the Act. Thus, in *St. Joseph's Hospital*, 221 NLRB 1253 (1976), after the 1974 Health Care Amendments resulting from enactment of Public Law 93-360 took effect and gave the Board jurisdiction over private nonprofit hospitals, the Board exercised jurisdiction over such a hospital notwithstanding the fact that the hospital had bargained with its employees' union for decades under the state framework and had negotiated a series of collective-bargaining agreements in the context of that framework, including one that expired after the effective date of the Board's jurisdiction.[6] *Id.* at 1256.

In *State of Minnesota*, 219 NLRB 1095 (1975), the Board considered the State of Minnesota's request that it cede jurisdiction over nonprofit hospitals to Minnesota. Minnesota

[6] Concededly, neither party argued that the Board should decline jurisdiction in *St. Joseph's*.

and supporting *amici* argued that Minnesota law had governed labor relations at such hospitals for decades and had been highly successful at accommodating the interests of all affected. *Id.* at 1095. The Board, however, determined that Congress intended for it to assert jurisdiction over nonprofit hospitals regardless of the disruption to hospitals, employees, and unions who had existed under well-established state frameworks. *Id.* at 1096. As the Board explained, "[a]lthough stability in labor relations has been achieved under the Minnesota statute in nonprofit hospitals in the State of Minnesota for over 25 years, it is clear that Minnesota law is preempted by Public Law 93-360 [which brought private, nonprofit hospitals under the Act]…There is no doubt that Congress was aware of this and fully realized that state legislation would have to yield to a paramount and uniform Federal policy." *Ibid.*

More recently, in a case arising in Pennsylvania, *MCAR, Inc.*, 333 NLRB 1098, 1100 (2001), the Board declined jurisdiction over the employer in 1988 pursuant to its decision in *Res-Care, Inc.*, 280 NLRB 670 (1986), rendering the employer subject to the PLRB's jurisdiction under Act 195. *Id.* at 1104. The employer and union subsequently developed a stable, years-long bargaining relationship under the PLRB's jurisdiction. *Ibid.* Then, the Board overturned *Res-Care* and thus the basis of its previous refusal to decline jurisdiction. *Ibid.*

When, after the Board overturned *Res-Care*, the union in *MCAR* filed a unit clarification petition with the Board rather than the PLRB, the employer argued to the Regional Director that the Board should decline jurisdiction because "the parties have always enjoyed a 'stable bargaining relationship' which has always been controlled by the PLRB and therefore it should stay that way." *Ibid.* The Regional Director rejected this argument, concluding that "[t]here is every expectation that the stable bargaining relationship can continue regardless of which agency exercises jurisdiction over the Employer." *Ibid.* The Board denied the employer's request for

review. *Id.* at 1107. When the employer resurrected its discretionary declination argument in a subsequent refusal to bargain case, the Board concluded that it had already resolved that issue in the unit clarification proceeding. *Id.* at 1098.[7]

Together, these cases demonstrate that the Board asserts jurisdiction even when doing so means that a bargaining relationship that arose and matured under state law will now be governed by the Act. The Union recognizes that the factual context in each of the above-cited cases was not identical to the facts at issue here. However, in each of the precedents cited, the Board was asked to assert jurisdiction over stakeholders—employers, unions, employees, and public officials—who had grown used to their state's legal framework for collective bargaining and who had made decisions with the expectation that this framework would continue to govern. By declining jurisdiction in each of these cases, the Board could have ensured that things would continue for these stakeholders just as they always had. Instead, the Board concluded that the congressional objective of the creation of a "paramount and uniform Federal policy" in the field of labor relations outweighed any inconvenience to the stakeholders of having to adjust to a new statutory framework—which inconvenience would be relatively minor and pose no threat to the

[7] In addition, the Board has never declined jurisdiction over a private employer who is an exempt entity's successor for collective bargaining purposes, even where the exempt entity has mature collective bargaining relationships with its employees' representatives pursuant to state law and those relationships will continue with the successor. *See, e.g., The Lincoln Park Zoological Society*, 322 NLRB 263, 263-64 (1996) (exempt entity that had negotiated successive collective bargaining agreements with its employees' unions in context of state law was succeeded by nonexempt entity, and Board exercised jurisdiction). In this context, the employees in the bargaining unit as well as their representatives have become accustomed to state law and operated with the expectation that state law will continue to govern, and are suddenly thrust into the federal framework by the change in employer. If parties having to adjust from state law to the Act were adequate grounds to decline jurisdiction, the Board would decline jurisdiction over private successors to public entities to ensure continuity for the affected employees and unions. But the Board does not do so. *Ibid.*

continuance of the existing bargaining relationships. *See State of Minnesota, supra* at 1096; *MCAR, supra* at 1104.

In other words, parties having to transition from state law to federal law is not a compelling reason for the Board to decline to exercise jurisdiction over matters entrusted to the Board by Congress. In the present case, the fact that bargaining relationships that have heretofore been subject to Pennsylvania law will henceforward be subject to the Act does not constitute grounds for declining jurisdiction. There is no reason to doubt that the parties will adjust and the bargaining relationship will continue. TUH's argument that the Board should decline jurisdiction because the parties have operated under Act 195 until now fails.

B. THE BOARD SHOULD EXTEND COMITY TO THE UNIT OF PROFESSIONAL AND TECHNICAL EMPLOYEES CERTIFIED BY THE PLRB IN 2006

The second issue as to which the Board granted review was whether the Board should extend comity to the professional and technical unit certified by the PLRB in 2006. Under controlling precedent, comity is proper here.

The Board's "established practice has been, and continues to be, to accord the same effect to the elections and certifications of responsible state government agencies as [the Board] attach[es] to [its] own, provided that the state proceedings reflect the true desires of the affected employees, election irregularities are not involved, and there has been no substantial deviation from due process requirements." *Allegheny General Hospital*, 230 NLRB 954, 955 (1977), *enf. denied on other grounds* 608 F.2d 965 (3d Cir. 1979). "A further requisite is that the unit established by the state agency not be repugnant to the Act; the state agency's unit determination, however, need not conform to Board precedent. *Ibid.*

Here, TUH raised two arguments against extending comity in its Request for Review.[8] The first was that the unit certified by the PLRB does not comply with the Board's Rule addressing Appropriate Units in the Health Care Industry ("Health Care Rule"), 29 CFR § 103.30. (RFR at 17 fn. 21.) It is not true that the unit certified by the PLRB runs afoul of the Health Care Rule. That Rule states that, in most circumstances, the only appropriate units in an acute care hospital will be units of one of the eight categories of employee listed or "various combinations of units" listed. 29 CFR § 103.30. Two appropriate units are "[a]ll professionals except for registered nurses and physicians" and "[a]ll technical employees." *Ibid.* The unit certified by the PLRB included "all full-time and regular part-time professional and technical employes…excluding physicians, nurses, pharmacists, office clerical employes, students, and employes on temporary visas, management level employes, supervisors, first level supervisors, confidential employes and guards as defined in the [Public Employe Relations] Act" (DDE at 7; Bd. Exh. 7(k)). Thus, the unit was a "combinatio[n] of" two of the units listed in the Rule, which the Rule specifically states may be appropriate. 29 CFR § 103.30.

[8] As explained by the Union in its Opposition to the Employer's Request for Review, the Employer conceded at hearing that, if the Board asserted jurisdiction over it, the elements needed to extend comity were satisfied (Opp. RFR at 19-21). Thus, in response to direct questioning by the Hearing Officer, the Employer conceded that the PLRB election reflected the true desires of employees, there were no election irregularities in the PLRB election, there was no substantial deviation from due process requirements in the PLRB election, and the unit certified by the PLRB was appropriate under the Act (Tr. 213-14; 220-21). These are all of the elements necessary for the Board to extend comity. *Allegheny General*, *supra* at 955. "[T]he Board has long held that a party's request for review may not raise any issue or allege any facts not timely presented to the Regional Director." *CEVA Logistics U.S., Inc.*, 357 NLRB 628, 629 (2011); 29 C.F.R. 102.67(e). Having conceded that all of the elements necessary to extend comity were satisfied at hearing, TUH cannot now claim that those elements were not satisfied. Yet that is what it has done. The Union reiterates its argument that TUH is barred from asserting that any of the elements necessary for comity were not satisfied.

In addition, although prior to 2006 it was represented by a different labor organization, the unit at issue has existed since 1975, long before the Board issued the Health Care Rule in 1989. *See Temple University*, 6 PPER 126 (1975) (finding unit of professional and technical hospital employees appropriate and directing an election therein, thus establishing the unit at issue here). Therefore, even if the unit were not an appropriate combined professional and technical unit under the Rule, it would still fall into the Rule's exception for "existing non-conforming units," which need not adhere to the units listed. *Crittenton Hospital*, 328 NLRB 879, 880-81 (1999) (where petitioner sought to replace incumbent union as representative of a unit of less than all registered nurses, Board found petitioned-for unit appropriate under the "existing non-conforming unit" exception to the Health Care Rule).

Finally, even if the unit did run afoul of the Health Care Rule, a "state agency's unit determination…need not conform to Board precedent." *Allegheny General*, *supra* at 955. Rather, all that is required is that "the unit established by the state agency not be repugnant to the Act." *Ibid.* Certainly nothing in the Act prohibits a unit of all professional and all technical employees at an acute care hospital, provided professional employees are given an opportunity to vote on inclusion in a unit with technical employees, which opportunity the PLRB gave the professionals at issue here in the 2006 election (DDE at 6-7; Bd. Exh. 7(k)). *See Doctors Osteopathic Hospital*, 242 NLRB 447, 448 fn. 6 (1979) (extending comity to a unit of all professional and nonprofessional employees at a hospital). Thus, TUH's assertion that the unit is inconsistent with the Health Care Rule is both incorrect and irrelevant.

TUH's second argument against extending comity is that "the PLRB's certification must be void for want of jurisdiction as of the time of its issuance" (RFR at 17). TUH contends that, if it were subject to the Board's jurisdiction in 2006, then the PLRB's jurisdiction was preempted,

and the Board may not recognize the representation proceedings of a state agency that lacked jurisdiction over the parties during those proceedings. This contention is incorrect.

The Board has recognized elections conducted by state agencies who had no jurisdiction over the parties in at least two factual contexts, both of which exist in the present case. The first context is when the parties agree that the state agency has jurisdiction to ascertain the representational preferences of the employees. *West Indian Co., Ltd.*, 129 NLRB 1203, 1203-04 (1961) (extending comity to election conducted by the Virgin Islands' labor agency at a time when the Board had jurisdiction over the parties because "the parties voluntarily participated in an election"); *Mental Health Center of Boulder County*, 222 NLRB 901, 901-02 (1976) ("Notwithstanding that the Board had jurisdiction over the Employer from the time the health care amendments to the Act became law, the parties opted for a state election the results of which led to the Union's certification by an appropriate state agency."); *We Transport, Inc.*, 198 NLRB 949, 949 fn. 6 (1972) ("we would not be inclined to encourage forum shopping by permitting parties who have already initiated a proceeding before a state agency subsequently to institute a like proceeding in the same matter before our agency"). This is true even where the employer's agreement is the result of the erroneous conclusion of the state agency that it, and not the Board, had jurisdiction over the employer. *See Mental Health*, *supra* at 901 ("the Employer had been informed by the Colorado Department of Labor and Employment that the National Labor Relations Board would not accept petitions for elections from entities such as the Employer but that the State of Colorado would do so," and the Employer thereafter initiated state proceedings).

The Board's rationale for extending comity to an election conducted by a jurisdiction-less state agency is twofold. First, where a party has *agreed* that a state agency may decide a matter affecting the party's rights, it cannot offend due process for the state agency to then decide the

matter. *See Allegheny General*, 230 NLRB at 955 (Board will not extend comity where there has been "substantial deviation from due process requirements."). Second, any other rule would strongly encourage forum shopping. *We Transport*, *supra* at 949 fn. 6. Thus, under a different rule, an employer could agree that a state agency has the authority to determine the representational preferences of its employees; then, if the employer did not like the election outcome, it could turn around and argue that the election was void for want of jurisdiction.

Here, TUH stipulated that the PLRB had jurisdiction to process the petition filed by the Union for the professional and technical employee unit (Bd. Exh. 7 at ¶ 30). Indeed, TUH actively argued against the incumbent's assertion that the PLRB's jurisdiction was preempted (DDE at 6). Because TUH agreed that the PLRB had the authority to process the petition, the Board will recognize the PLRB's proceedings, regardless of whether the PLRB had jurisdiction at the time.

The second factual context in which the Board will extend comity to state representation proceedings conducted at a time when the state lacked jurisdiction over the parties occurs when the parties recognize the state's determination and commence bargaining. *Screen Print Corp.*, 151 NLRB 1266, 1270 (1965). Thus, in *Screen Print*, a state agency certified the union as the employees' bargaining representative, and the employer and union thereafter held two bargaining sessions. *Ibid.* The employer then discontinued bargaining and attacked the state's certification as void for want of jurisdiction. *Ibid.* The Board rejected the employer's attack, explaining that once the employer "embark[ed] upon bargaining negotiations," it "abandoned" any objection to the state agency's jurisdiction. *Ibid.* Here again, the Board reasoned that due process could not be offended where an employer has voluntarily recognized the validity of the state's certification, and that permitting an employer to challenge a state certification after it commenced bargaining

would undermine stability in labor relations. *Ibid.* As the Board explained, permitting an employer who has recognized a union pursuant to a state certification to attack the certification on jurisdictional grounds after bargaining was underway "would…vest one of the bargainers with a power of gravest mischief: an employer could lead the certified union through months of negotiation and nullify its fruits by attacking from the start the ostensible premise of the protracted labors." *Ibid.*

Here, TUH immediately recognized the validity of the PLRB's certification and commenced bargaining. Indeed, it filed no objection to the 2006 election. Moreover, TUH and the Union negotiated multiple successive collective bargaining agreements following the issuance of the certification, including one that expired after the election at issue in the present case. (DDE at 7) Because TUH recognized the PLRB's certification and commenced bargaining (to say the least), comity is proper. *Screen Print, supra* at 1270.

The Board's refusal to extend comity to certain state proceedings in *Summer's Living Systems, Inc.*, 332 NLRB 275 (2000), is fully consistent with these principles and serves to illustrate why comity is proper in the present case. There, the Board refused to extend comity to elections conducted by a state labor agency after a change in Board law had deprived the state agency of jurisdiction. *Id.* at 286. However, unlike the situation here, the employers there argued that the state agency lacked jurisdiction during the representation proceedings. *Id.* at 280, 281. Moreover, the employers refused to honor the state agency's ultimate determinations as to their employees' representational status, contending that the agency had no authority to make such determinations. *Id.* at 280, 281, 282, 283. The Board concluded that to extend comity to the certification of a state agency to whose jurisdiction the employer never agreed, whose determinations the employer never accepted, and who in fact did not have jurisdiction, would

constitute a "substantial deviation from due process requirements," essentially compelling an employer to submit to a state agency to which it was not required to submit under law. *See Allegheny General*, 230 NLRB at 955; *Summer's Living*, *supra* at 286.

These facts are in sharp contrast to those in the present case, where TUH stipulated that the PLRB had the right to decide its employees' representational status, actively argued in favor of this right, and immediately recognized the validity of the PLRB's determination. In these circumstances, TUH, having willingly submitted to the PLRB's authority and willingly accepted the PLRB's determination, cannot credibly argue that recognizing the PLRB's determinations would offend due process.

V. CONCLUSION

For all of the foregoing reasons, the Board should assert jurisdiction over TUH and extend comity to the unit certified by the PLRB in 2006.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January, 2017, true and correct copies of the Petitioner's Brief on Review were served by electronic mail upon:

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